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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 633

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are copied in the appendix to the petition for certiorari (Appdx. Pet.). The first opinion (Carter, J.) is not the opinion on which the District Court (Wollenberg, J.) entered the judgment appealed from, and petitioner is incorrect in saying (p. 2) that Judge Wollenberg reversed Judge Carter. The first opinion (Carter, J.) related to the first amended complaint, but that complaint was superseded by the second amended complaint which contained different allegations and raised different questions.

The opinion of the Court of Appeals shows that two appeals by petitioner were disposed of in a single

opinion, each appeal involving the same transactions, the same issues, and the same appellant, but different groups of appellees. Petitioner seeks certiorari only in this, the *Anderson* case, having abandoned its petition for certiorari in the *Chickering* case after the record was filed in this Court.

QUESTIONS PRESENTED

1. Did the Court of Appeals actually hold what petitioner argues it held on indispensable parties? *Infra* pp. 7-9.

2. If it did and in so doing erred, should certiorari be granted where the Courts below correctly ordered the action dismissed on two independent and alternate grounds, neither of which is challenged or presented in the petition as a question for review? *Infra* p. 9.

3. Must this Court decide, under the single question presented, whether some expression in the opinion of the Court of Appeals prevented petitioner from seeking leave to substitute other parties for it as plaintiffs, where petitioner not only did not seek such leave in either Court below to substitute such parties, but actually opposed all efforts to bring them into this action on the ground that their joinder would destroy diversity jurisdiction and they were not indispensable parties anyway? *Infra* pp. 10-15.

ONLY STATE LAW INVOLVED

The decisions below were bottomed on California law. Contrary to petitioner's contentions, Rule 19, Federal Rules of Civil Procedure, was neither discussed, cited, nor involved in the opinion of the Court of Appeals.

STATEMENT

The grounds on which the Courts below based their judgments of dismissal are more fully and accurately stated in their opinions than in the petition for certiorari. Many of the statements of petitioner are designed to make it appear that its claim is highly meritorious, and that frauds of the worst kind were perpetrated on it during a quarter of a century. Suffice it to say that petitioner, by not presenting the question, admits it had no claim, and lets stand unchallenged the holdings of the Courts below that its pleadings showed that no fraud had been committed on it because they showed that all of those persons who constituted its "corporate being had knowledge and approved of the transaction complained of and such approval may be found on the company's books." (Appdx. Pet. p. 11a.)

This action was brought by petitioner, a corporation, to nullify 59 ancient deeds. The gravamen of the complaint was that some of its agents and employees had made and retained profits when they resold the lands conveyed in the 59 different deeds to them and to others. The profits, however, were alleged to have been made and retained by them with the knowledge and approval of all petitioner's stockholders, directors and officers. Its stockholders were the trustees of the Henry Miller Trust, who as trustees owned all of petitioner's stock. (R. 425-433, 38, 40-41, 88-90, 991, 595-605, 753-755, 455-458, R. vol. 4, pp. 17-20, 329-331.)

The District Court dismissed the action for failure to state a claim and to state a claim not barred by the statutes of limitations. In so doing it said: "Plaintiff's complaint shows that all those persons who constitute plaintiff's corporate being had knowledge and

approved of the transaction complained of and such approval may be found on the company's books. It is an elementary proposition of law that fraud requires complainant's lack of knowledge and that affirmance waives fraud. * * * Notice to all of the stockholders of a matter so intimately affecting their rights must be deemed notice to the corporation. What we have here, however, is more than mere notice to the corporation. We have plaintiff alleging in his complaint actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong. As unanimous consent renders fraud impossible, no wrong has been done to the plaintiff." (Appdx. Pet. 11a.)

Moreover, the Court would make no distinction between knowledge and consent of stockholders who are trustees and stockholders who are not trustees. It said: "Stockholders who are trustees of stock are nonetheless stockholders with all the powers and rights of stockholders. Their fiduciary obligations to their beneficiaries do not deprive them of their status as shareholders or make the beneficiaries shareholders in their place. They and they alone hold the legal title to stock and the right to vote it and exercise all other rights incident thereto. 'Shares standing in the name of any person as * * * trustee * * * may be voted and all rights incident thereto may be exercised only by the * * * trustee * * * in person or by proxy, and without proof of authority.' Cal. Corp. Code Sec. 2218." (Id. p. 12a.)

Petitioner necessarily recognizes the correctness of the holding of the District Court on these two points for it says it does not tender, as an independent ground supporting the exercise of this Court's cer-

tiorari jurisdiction, the holding on the points. (Pet. pp. 13-14).

The District Court went on to hold that petitioner's claim must be dismissed for another reason, giving as the reason that if petitioner ever had a claim the claim was barred by the statutes of limitations of California before this action was brought (id. p. 13a). Again, petitioner nowhere in its petition contends the Courts below erred in holding its claim was barred.

Petitioner at times contended in the Courts below that the action of its stockholders in consenting to and approving the transactions was not binding on it because its stockholders were trustees who had breached their fiduciary duties to the beneficiaries of the Henry Miller Trust when they consented to and approved the transactions. At other times, it denied that it had "ever suggested that it was the breach of the Henry Miller Trust which was in question."[1] The District Court finally disposed of the petitioner's conflicting positions by holding as a further and additional ground for dismissing the complaint that even if petitioner had a claim which arose out of the trustees' breaching a fiduciary duty to the beneficiaries of the Henry Miller Trust when they consented to and approved the corporate transactions, nevertheless the trustees and beneficiaries of the Trust would be indis-

[1] In petitioner's Opening Brief in the Court of Appeals it said at pp. 60-61: "Nowhere in the complaint nor in oral argument nor in written argument has appellant ever suggested that it was the breach of the Henry Miller Trust which was in question. This suggestion has come solely from the appellees who have at every opportunity attempted to contort appellant's position. This is a *corporate* action, brought by the *corporation* for the breach by its fiduciaries of their duty to the corporation. The defendants may also be guilty of wrongs to others but that is completely irrelevant."

pensable parties, and their joinder would destroy diversity jurisdiction (Appdx. Pet. pp. 13a-14a). This was true, the Court said, because all of the beneficiaries were residents of California, and some of them were the trustees of the Henry Miller Trust and the directors of the corporation who were charged with wrongs in consenting to and approving the transactions. In this regard the Court said: "It is also to be noted that plaintiff charges in his complaint that some of the beneficiaries are wrongdoers—in fact at least one is charged as a party to the conspiracy. *Therefore, there are conflicting interests among these beneficiaries which must be litigated herein.* In order for this Court to enter any judgment equitable in nature, the respective positions of the various beneficiaries must be determined. It is apparent, therefore, that this action will fail on jurisdictional grounds if these indispensable parties are brought in." (Emphasis supplied) (Appdx. Pet. pp. 13a-14a.)

These parties who the Court held were indispensable parties and whose joinder would have defeated diversity jurisdiction, are the parties whom petitioner now says it has been prevented from substituting as plaintiffs by something the Court of Appeals said in its opinion about some dropped defendants.

The Court of Appeals in a unanimous opinion affirmed the judgment of dismissal (Appdx. Pet. pp. 15a-26a). After reviewing the allegations in the complaint and the holding of the District Court that the unanimous consent of petitioner's stockholders rendered fraud impossible, the Court said: "That a corporation is hurt, or destroyed, by the intended conduct of the owners of its shares, gives rise to no legal claims, either in the shareholders, or in the corporation as a legal entity." (Id. p. 24a.)

The Court went on to point out that the minutes of petitioner's board of directors showed that these transactions had been investigated in 1939 by the board and, after having been discussed at two successive meetings, the investigation was closed.

We will discuss later (*infra* pp. 7-9) what the Court said about petitioner dropping some of the defendants from its complaint.

REASONS FOR NOT GRANTING CERTIORARI

Petitioner does not seek certiorari, so it says, on the ground that the Courts below erred in holding that it had no claim, or no claim not barred by limitations (Pet. pp. 13-14). It seeks the writ solely on the ground that the Court of Appeals held that the defendants whom petitioner had voluntarily dropped from the action before it filed its second amended complaint, were indispensable parties, a holding which the Court did not make. It readily concedes that the holding of the Courts below that it has no claim is an independent ground on which their decisions can rest, but it argues that the further holding that the dropped defendants were indispensable parties has forever prevented it from substituting the trustees and beneficiaries of the Henry Miller Trust for it as the plaintiffs (Pet. pp. 19-22). The argument is without merit as we shall show.

A. Court Did Not Hold What Petitioner Says It Held

The Court of Appeals nowhere in its opinion held that the dropped defendants were indispensable parties. It neither cited nor discussed Rule 19, Federal Rules of Civil Procedure, nor did it use the words "indispensable parties" anywhere in its opinion in connection with the dropped defendants. If what the

Court said about the dropped defendants means, as petitioner contends, that they were indispensable parties, such meaning must be gathered from a construction of the language in the opinion and not from what the Court expressly said. The construction which petitioner contends for is not reasonable because the Court was familiar with Rule 19 and its own opinions on indispensable parties, but never cited either, or expressly held that the dropped defendants were indispensable parties.

All the Court did or intended to do was to point out that if a claim had been stated and the case had been tried on the second amended complaint, a court of equity might have concluded that the liability of the transferees, who had acquired their lands by mesne conveyances, and who remained in the case as defendants, would be different from that of the dropped defendants who, as trustees, owned all of petitioner's stock, and had been named in the second amended complaint as the primary wrongdoers. It said: "A court of equity might well conclude that it should not require the party least at fault to bear alone the entire responsibility for the wrong." (Appdx. Pet. p. 21a.) The Court merely was pointing out the problems which would certainly arise, and the inequities which would follow, were the Court to hold that a corporation can upset its ancient deeds knowingly approved by all of its stockholders.

Petitioner's argument that the Court held that the dropped defendants were indispensable parties under Rule 19 is new. No such argument was made by petitioner in its petition for rehearing, nor did it there cite Rule 19, or even mention indispensable parties in regard to what the Court said about the dropped de-

fendants. Furthermore, petitioner never even suggested in its petition for rehearing that it had forever been foreclosed, by what the Court said in its opinion about the dropped defendants, from substituting the trustees and beneficiaries of the Henry Miller Trust for it as the plaintiffs. Petitioner did not make this suggestion because it was aware that both Courts below knew that petitioner not only had not requested leave to make the substitution, but that it had opposed bringing the trustees and beneficiaries into this action.

B. Judgments Are Based On Other Independent Grounds

Even if the Court of Appeals did hold, as petitioner argues it did, that the dropped defendants were indispensable parties, this Court need not decide whether the Court below erred in such holding because the opinion of the Court shows that its judgment is supported by other independent grounds; viz, that petitioner has no claim, and that any claim it may ever have had is barred by limitations. These two independent holdings have not been presented by petitioner as questions for review under Rule 23(1)(c), nor does petitioner contend that any question regarding the holdings is included or fairly comprised within the single question presented in the petition.

Moreover, it is also unnecessary for this Court to consider the single question presented in the petition, because where a claim is not stated in the complaint a court is not required to determine who would have been necessary parties defendant had a claim been stated. *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

The Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *Stickel* v. *United States*, 76 S. Ct. 1067, 1 L. Ed. 2d 30 (1956) not officially reported.

C. Issue Of Substitution Not Raised Below—No Validity To Argument

For the reasons just discussed it would appear that no further argument is necessary, because (a) the judgments of the Courts below were the only valid judgments which could have been entered; and (b) the grounds on which the judgments were entered are not challenged as a basis for this Court exercising its certiorari jurisdiction. However, since petitioner pretends to have been forever foreclosed from attempting to substitute other plaintiffs for it by something the Court of Appeals said in its opinion on a wholly immaterial matter, we will briefly reply to petitioner's argument on substitution. It is important to note, though, that petitioner has presented no question on substitution under Rule 25(1)(c).

(1) It was nothing the Court of Appeals said in its opinion about the dropped defendants which foreclosed petitioner from substituting the trustees and beneficiaries for it as the plaintiffs. One of the many reasons why petitioner is now foreclosed is that neither it nor the parties it would now substitute timely requested leave to substitute. Whether leave should have been granted had the request been timely made, is not a question before this Court, because this question would have arisen only had leave been requested. Whether a judgment of dismissal should be reopened to allow an amendment cannot be raised in a brief where no motion to reopen was made in the District Court. *Gutensohn v. Kansas City Southern Ry. Co.*, 140 F. 2d 950, 952 (8th Cir. 1944). What petitioner actually seeks for the first time in this Court is a reopening of a judgment which it does not contend, as grounds for certiorari, was wrong.

Moreover, petitioner not only did not request leave of the District Court to make the substitution, but it actually contended that the trustees and beneficiaries were not indispensable parties, and should not even be in the case because, it argued, the claim it was asserting was not their claim, but its own claim. For this reason alone the question on substitution, which petitioner now argues, need not be decided by this Court.[3]

How this Court could review a decision or ruling never made by either Court below, petitioner does not say. Obviously the argument on substitution, made for the first time in this Court, is an attempt to make it appear that petitioner has been harmed by an expression of the Court of Appeals on a wholly immaterial matter, and that there is substance to the single question presented in the petition.

(2) We would further like to point out that if leave to amend and substitute had been requested at any time, the District Court could not have granted the request because the substitution would have destroyed diversity jurisdiction. This would have been true because the new plaintiffs would have been citizens of California, and forty-four of the fifty-seven defendants already in the action were also citizens of California. It would also have been true because the beneficiaries, including J. Leroy Nickel, Jr., who had been charged by petitioner with wrongdoings, and who, too, were citizens of California, would have been, according to the decision of the District Court (Appdx.

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[3] *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955); *United States* v. *Fleischman*, 339 U.S. 349, 365 (1950); *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947); *Owens* v. *Union Pacific R. Co.*, 319 U.S. 715, 724 (1943); *Walters* v. *City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

Pet. pp. 13a-14a) indispensable parties defendants in any action involving a breach of the Henry Miller Trust. Petitioner does not explain how diversity jurisdiction could have been saved under either of these circumstances.[4]

(3) Moreover, the position petitioner has taken in this Court regarding substitution is so contrary to the position it took in the District Court regarding the trustees and beneficiaries not being indispensable parties to its action, that petitioner should not be

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[4] Petitioner, in an attempt to show that diversity jurisdiction would not be destroyed if new plaintiffs were substituted, argues that "in all likelihood the complaint would under the circumstances be amended to name the present trustees of the Henry Miller Trust rather than the beneficiaries as plaintiffs." (Pet. p. 21, n. 11.) It then goes on to say that the Court of Appeals was wrong when it held that the beneficiaries would have to be the plaintiffs in any action involving a breach of the Trust. We respectfully submit the Court was not wrong. The trustees could not have brought such an action because they could not have represented the beneficiaries where the interests of the beneficiaries were in conflict, and they would have been in conflict since there would have been wrongdoing beneficiaries and non-wrongdoing beneficiaries. Their interests would have had to be settled requiring their joinder. *Carey, et al.* v. *Brown*, 92 U.S. 171, 172 (1875); *Mitau* v. *Roddan*, 149 Cal. 1, 7-8, 84 Pac. 145, 147 (1906); *Straube* v. *Security First Nat. Bank of Los Angeles*, 205 Cal. App. 2d 352, 361, 23 Cal. Rptr. 213, 219 (1962); Bogert, Trusts and Trustees (2d ed.), § 593, p. 277. Furthermore, J. Leroy Nickel, Jr. was not the only beneficiary that petitioner charged with wrongdoings. Also charged were J. Leroy Nickel, Sr., a life tenant beneficiary from 1916 to 1937; Nellie Miller Nickel, a life tenant beneficiary from 1916 to 1944; George W. Nickel, Sr., another life tenant beneficiary; and George W. Nickel, Jr. and Henry Miller Bowles, both contingent remaindermen beneficiaries, all of whom were at one time or another directors of petitioner. (R. vol. 4, pp. 17-20, 329-331; R. 455, 595, 601-603, 753-754.) Because these beneficiaries were charged with wrongdoings the District Court said: "It is also to be noted that plaintiff charges in his complaint that some of the beneficiaries are wrongdoers—in fact at least one is charged as a party to the conspiracy." (Appdx. Pet. p. 13a.)

heard to say in this Court that the trustees and the beneficiaries should be subsituted for it as the plaintiffs. Petitioner invoked a ruling in the District Court (Carter, J.) on its first amended complaint that the new trustees and the beneficiaries were not indispensable parties to its action. (Appdx. Pet. pp. 1a-5a.) It then filed a second amended complaint in which it appeared more clearly than ever that petitioner had no claim, but that if it did have a claim the new trustees and the beneficiaries would be indispensable parties. Again petitioner contended that the trustees and the beneficiaries were not indispensable parties, but the District Court (Wollenberg, J.) held that (a) petitioner had failed to state a claim; (b) that if it had stated a claim its action was barred by limitations; and (c) that if it had stated a claim not barred by limitations the new trustees and the beneficiaries would be indispensable parties to any claim it might have, and their joinder would destroy diversity jurisdiction. (Appdx. Pet. pp. 10a-13a.) Petitioner never thereafter sought leave to amend its pleadings to bring into this action the trustees and beneficiaries, if they could have been brought in, nor did it seek leave to substitute them for it as the plaintiffs, if they could have been substituted. Thus we see that not only did petitioner not seek substitution, but it actually opposed bringing into its action the parties it now says it has forever been prevented from substituting as the plaintiffs for it. Positions so inconsistent are not to be tolerated.

(4) We will not extend this brief by debating with petitioner the question of whether substitution could have been made had leave been timely requested. Suffice it to say that leave was never requested. How-

ever, we must say that we do not agree with petitioner's argument that leave would have had to be granted as a matter of law.[5]

Petitioner's further argument in this Court that the claim of the trustees and beneficiaries would be the

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[5] Petitioner's argument that substitution will be permitted so long as recovery is sought upon the same general set of facts is a misstatement of the law. The law of California and in the federal courts is that substitution will not be permitted where the defendant would be required to answer a wholly different legal liability or obligation from that originally stated. The cases cited by petitioner are essentially different from the instant case. *Klopstock* v. *Superior Court*, 17 Cal. 2d 13, 108 P.2d 906 (1941), involved a mere error in the nominal party-plaintiff who brought a derivative suit for the benefit of the corporation. The executor of the deceased executor of the estate of a deceased stockholder brought suit in that case instead of the representative of the estate of the deceased stockholder. The California Court permitted substitution because the claim was still the claim of the corporation. In the instant case, petitioner seeks to substitute for a corporate claim the wholly distinct claim of different persons, the beneficiaries of the Trust which owned the corporation's stock. Petitioner's other cases are also distinguishable. In *Wennerholm* v. *Stanford University School of Medicine*, 20 Cal. 2d 713, 128 P. 2d 522 (1942) the same plaintiff was permitted to amend a claim for negligence to one for fraud upon the same general set of facts without suffering the bar of the statute of limitations upon the amended claim; a wholly new plaintiff was not involved. In *Austin* v. *Massachusetts Bonding & Ins. Co.*, 56 Cal. 2d 596, 364 P. 2d 681 (1961) it was held that where a defendant surety was sued by fictitious name and its true name later discovered and substituted by amendment, it is considered a party to the action from the commencement of the action so that the statute of limitations stops running from the date of the earlier pleading. *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95 (2nd Cir. 1941) was a class action and did not involve any new cause of action. The Court permitted joinder of an additional plaintiff where no statute of limitations was involved. *American Fid. & Cas. Co.* v. *All American Bus Lines*, 190 F. 2d 234 (10th Cir. 1951) allowed substitution of an excess insurer as the real party in interest in place of the plaintiff insured who was suing the primary insurer for alleged bad faith in failing to accept an offer of settlement where no new cause of action was introduced.

same as the claim previously asserted by petitioner is contrary to the position it took in the Courts below. It there argued that the claim it was asserting was a corporate claim, while the claim of the trustees and beneficiaries would be a claim for a breach of the Henry Miller Trust. It said that it had never "suggested that it was a breach of the Henry Miller Trust which was in question." *Supra* p. 5, n. 1. In speaking of the two different claims it again said in its Reply Brief in the Court of Appeals (p. 8): "They present two separate and distinct causes of action lying in two separate and distinct parties."

If the question had been raised below, we submit that leave to substitute could not have been granted because the claims would have been different, the parties would have been different, and the claim of the substituted parties would have been barred by limitations, if for no other reason, because the new complaint could not have related back to the date of the original complaint.[6] Moreover, diversity jurisdiction would have been destroyed. *Supra* pp. 11-12

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[6] The petitioner's claim was one for fraud upon it by its officers, agents and others, and involved questions of corporate knowledge and assent and limitations against a corporation. It did not involve any question about the knowledge and consent of the benficiaries to the corporate transactions, but only the knowledge and consent of petitioner's stockholders, directors and officers. In contrast, a claim by the new trustees and the beneficiaries would have been a claim for a breach of the Henry Miller Trust, and would have involved questions of knowledge and participation by the beneficiaries, the terms and validity of the Trust, applicable trust law and limitations against beneficiaries. The two different claims would have involved wholly different potential liabilities. See *Shenberg* v. *DeGarmo*, 61 Cal. App. 2d 326, 331, 143 P. 2d 74, 77 (1943), hrng. den. An amendment will not be permitted to set up a different claim under California law. *Dubbers* v. *Goux*, 51 Cal. 153, 155 (1875); *Baker* v. *Littman*, 138 Cal. App. 2d 510, 515, 292 P. 2d

The Trustees and Beneficiaries Are Alone To Blame If Their Claim Is Barred

Petitioner assumes, without any justification, that the 25-year old claim of the trustees and beneficiaries was not barred by the 3-year statute of limitations of California (§§ 312, 335, 338(4), California Code of Civil Procedure) when petitioner brought this action on September 10, 1954 (R. 49), but it says that their claim has since become barred. It then, by inference, blames the District Court for the trustees and beneficiaries allowing the bar to fall against their claim. The blame has been misplaced, as we shall show.

The beneficiaries—or at least some of them—filed two identical suits on their claim in two different state courts of California at about the same time petitioner instituted this action, but they voluntarily dismissed both actions even before Judge Carter held on May 15, 1956 that, on the basis of the allegations in the first amended complaint, the trustees and beneficiaries were not indispensable parties in this action (R. vol. 4, pp.

595, 598 (1956); or under federal practice. *National Maritime Union of America* v. *Curran*, 87 F. Supp. 423, 428 (S.D.N.Y. 1949); *Schwartz* v. *The Olympic, Inc.*, 74 F. Supp. 800, 801 (D. Del. 1947); *Schram* v. *Poole*, 97 F.2d 566, 572 (9th Cir. 1938); *St. Paul Fire and Mar. Ins. Co.* v. *Continental Bldg. Op. Co.*, 137 F. Supp. 493, 494-495 (W.D. Mo. 1956); *Aarhus Oljefabrik A/S* v. *A. O. Smith Corp.*, 22 F.R.D. 33, 35 (E.D. Wis. 1958). A complaint setting up a new claim will not relate back to the date the original complaint was filed so as to avoid the bar of limitations, and this is particular true where the plaintiffs are all new: *Stone* v. *James*, 142 Cal. App. 2d 738, 740, 299 P. 2d 305, 307 (1956); *Thompson* v. *Palmer Corp.*, 138 Cal. App. 2d 387, 396, 291 P. 2d 995, 1001 (1956); *Ward* v. *Oakley Co.*, 125 Cal. App. 2d 840, 851-852, 271 P. 2d 536, 543-544 (1954); or where the original plaintiff did not state a claim. *Weighel* v. *United States*, 47 Ct. Cl. 528 (1912).

134-147, 259-272). Therefore, petitioner cannot contend that the beneficiaries, in dismissing their state court actions, relied upon an opinion of Judge Carter which had not been rendered.

But even more than that, Judge Carter in his opinion of May 15, 1956, did not hold that petitioner had stated a claim, or had stated a claim not barred by limitations. He reserved these questions for future determination. But before the determination could be made, petitioner, rather than face the motions to dismiss its first amended complaint, elected to file on April 17, 1958 (R. 460) a second amended complaint in which it made vitally different allegations. This second amended complaint was filed more than three years after petitioner instituted this action, and if the bar of the 3-year statute of limitations fell against the claim of the trustees and beneficiaries during this period of more than three years, petitioner or the trustees and beneficiaries must assume the responsibility, and not the District Court.

Petitioner offers no reason why the beneficiaries dismissed the state court actions, or why they did not bring another action in some other court before the bar of limitations fell. The beneficiaries must have known all along that petitioner was contending that this action involved only its claim, and not the claim of the beneficiaries, and was also contending that the beneficiaries were not indispensable parties to its claim. Also, the beneficiaries must have known, if it can be said they relied in any way on what Judge Carter said in his opinion, that only the claim of petitioner was involved in this action, and that whether the petitioner had stated a claim was reserved by the Court for later decision. Everything points to the bene-

ficiaries either being dilatory or having no desire to prosecute any claim they may ever have had.

Respondents, whose titles have been clouded for more than nine years, are entitled to have this litigation come to an end. The District Court gave petitioner every opportunity to state a claim, or to state a claim not barred, if it could, but it could not. It now admits, by not presenting the question, that it has no claim. When the District Court ordered this action dismissed it did not order it dismissed without leave to amend, but petitioner did not again seek leave to amend, or to substitute. On the contrary, it elected to stand on its second amended complaint. It cannot argue that the District Court did anything which prevented it from seeking leave to amend or to substitute, or prevented the new trustees and the beneficiaries from bringing their claim, if any, into a proper court. If petitioner, who has no claim, is allowed to return to the District Court and ask at this late date for leave to substitute the new trustees and the beneficiaries of the Henry Miller Trust and their claim, respondents' titles will continue to be clouded for many more years by a stale claim.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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